No. 209

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

October 1952 Term.

MICHAEL M. WEISS,

Petitioner,

AGAINST

K. McKINLEY SMITH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER 1952 TERM.

MICHAEL M. WEISS,

Petitioner,

AGAINST

K. MCKINLEY SMITH,

Respondent.

BRIEF OF RESPONDENT.

Statement of Case.

Plaintiff appealed (R. 493), and Defendant cross-appealed (R. 499-500) from a judgment (R. 489-492) of the United States District Court for the District of Connecticut (Smith, *D. J.*) dated February 18, 1952, in an action (Civ. No. 3366) in which the Complaint (R. 6-12) was filed on July 9, 1951.

The complaint sought specific performance of defendant's Option Agreement, dated November 21, 1950 (R. 11-12), with respect to one-third of defendant's one-half stock interest in two Delaware Corporations to wit: Biggs Boiler Works Company (hereinafter "Biggs") and Central Management Corporation (hereinafter "Central") (R. 11-12).

Issue was joined on July 28, 1951 by the filing of the defendant's Answer (R. 13-16).

Thereafter, the case was tried on the merits to the Court (Smith, *D. J.*) on September 25-27, 1951 (R. 33-324).

The said judgment of the Court, from which said cross-appeals were taken, was in the form of a decree ordering defendant to specifically perform the Option Agreement upon condition that plaintiff first file an undertaking or escrow agreement to assure the carrying out, on plaintiff's part, of the agreement between them pursuant to which the option was given (R. 490-492).

Plaintiff appealed (R. 493) from so much of the judgment as imposed such conditions. Defendant cross-appealed (R. 499) from so much of the judgment as granted any specific performance whatsoever and failed to dismiss the complaint.

The Circuit Court of Appeals, on June 19, 1952 (Augustus N. Hand, Clark and Frank, Circuit Judges) unanimously affirmed, on the lower Court's opinion, the judgment appealed from (R., pp. 504, 505).

Facts.

When defendant and one, Krizanek, gave plaintiff the option, defendant and Krizanek were 50-50 stockholders. As is usual in such close corporations they looked upon each other as *partners* (R. 81, 184, 305). They agreed to and had *equal* salaries (R. 80, 82, 115). They agreed to *equal* profits (R. 305, 115). They agreed that neither one could sell his stock without giving the other first choice (R. 305, 115). They agreed to *equal* representation on the Board of Directors and that such *equal* directors would elect and keep defendant as President and Krizanek Vice President (R. 82, 83).

The option in suit was given to the plaintiff Weiss as part and parcel of a financing undertaking, by Weiss (R. 381, 439, 139, 186).

Weiss and his associate Garfinkel owned or controlled 75% of the stock of a finance company, known as Allied Commonwealth Corporation (hereafter "Allied") (R. 42). Weiss was approached by Smith to have his company finance Biggs and the option arose from such financing agreement (R. 439, 381).

The option was given "in return for such financing" (R. 381); and "given in connection with the arrangements to be made for the financing of these two companies by Mr. Weiss's company" (R. 385). Weiss stated he would recommend the financing "if he can get one-third of the stock and be considered as a partner" (R. 439).

Steadman, plaintiff's witness, and the attorney who drew the option and handled the entire matter, testified that the option and the finance agreements were only "part of the deal" (R. 81) and that other parts thereof were the agreements that Allied countersign the checks, have two men on a four man Board of Directors, and have equality of salaries with Krizanek, and Smith (R. 81). Such salary, $1000 a month (R. 185, 308) and the option were the price for the financing, in addition to the 18% interest, to be contrasted with the 12% interest paid the previous financier without any "salary" or option (R. 132).

Smith and Krizanek were particularly worried about the demand for the option agreement, which would split the stock three ways, and about the demand of Weiss, for equal control of the Board of Directors. Both of these demands threatened their previous equality of control and management and salaries (R. 202, 205-207).

Therefore when Weiss stated that he would recommend the financing "if he can get one-third of the stock" he assured them that "this was because he wanted to be considered as a *partner*" (R. 439), and he "didn't want to disrupt the *partnership* relationship between Krizanek and Smith" (R. 184) because "I wanted to be fair with these men. I figured Mr. Krizanek and Mr. Smith are

two *partners* and I figured it wouldn't be fair if I would ask for myself for more than they have in the company" (R. 184). See further (R. 138, 287).

It was therefore agreed, with respect to Weiss's demand for a salary, that the prior *equality of salaries* between Krizanek and Smith would be maintained, in this "three-way partnership" except that Weiss would receive $1000 a month, an amount equal to that of plaintiff or Krizanek (R. 82, 185) and "whenever" one of the partners got a salary, the same was to be paid the others (R. 185, 186, 139, 138).

With respect to management, Weiss testified that when he "insisted that we should have two members of the four on the Board" (549) and asked for the option, he assured Smith that no management changes would be made (R. 186), and that Smith and Krizanek would be *maintained* in their respective positions (R. 186), they to continue to do the managing and Weiss the financing (R. 186, 160, 287, 82).

Thus the option and the equal Board of Directors were *admittedly* given, on the understanding, that, they would *not* disturb the 50/50 partnership relation between Krizanek and Smith *except* to create a one-third, one-third, one-third *partnership* relation between Krizanek, Smith and Allied, i.e. Weiss.

To create some practical protection against either Krizanek or Smith teaming up with Weiss and disrupting this three way partnership relation, Smith and Krizanek, simultaneously with the giving of the option to Weiss, set about to create a voting trust of their stock.

Steadman testified that about a year before Weiss came into the picture, he had been asked by Krizanek for "some kind of arrangement" whereby neither Mr. Krizanek nor Smith "would never at any time vote their shares against each other" (R. 83). This protection, had been acutely necessary before Smith and Krizanek bought out their third partner Keyes (R. 83), remained quiescent after Smith and

Krizanek bought out Keyes and became 50-50 owners; and mushroomed again when the option to Weiss threatened to create, once again, a three way stockholding (267). As a result and on Nov. 21, 1950, when the option was given Weiss, both Smith and Krizanek insisted on the voting trust agreement (R. 89) and on December 6, 1950, the voting trust agreement was entered into between Krizanek, Smith and Steadman, whereunder Krizanek and Smith agreed, that Krizanek, Smith and Steadman would be *voting trustees,* of their stock and on the advice of Steadman this voting trust agreement provided that a majority vote would control (R. 83, 89, 218).

But as Smith, rather quickly found out, he had entrapped himself when he created this "protective" device and placed himself under the "protective" wing of his own attorney, Steadman. For it was not long before Krizanek and Steadman, teamed up with Weiss and threw Smith out of the company as officer, director and deprived him of his salary.

Weiss made the first move, in the sequence of events which resulted in Smith's ouster, and on March 22nd, 1951 Allied suddenly notified Biggs that it was "discontinuing financing" (R. 428, 412).

As Steadman and Krizanek pointed out this left Biggs without funds, and "precipitated a crisis in Biggs Boiler" (R. 52, 142). This breached the express provision of the finance agreement that it was to run for one year (R. 142, 132, 137, 66, Pltff.'s Ex. 8). This put Biggs "out of business" (R. 251).

Thereupon on March 30th, 1951 Krizanek and Smith, acting on the advice of their attorney Steadman (R. 138), notified Allied that, by virtue of Allied's breaches of its agreements, all agreements were *rescinded, "including the option"* (R. 141, Pltff.'s Ex. 14, 374).

Events moved quickly, between March 22, 1951, when Weiss suddenly discontinued financing, and April 16, 1951

when, at Weiss' demand and request Krizanek and Steadman, as Voting Trustees of Smith's stock, voted such stock to throw Smith out of the company as President, Director and to deprive him of his salary.

On April 4th, and after Steadman had advised Krizanek and Smith to rescind Weiss' option, because of his "multiple breaches" of his finance agreement, Krizanek, at the advice of Steadman and on demand of Weiss, notified Smith that on April 16th they, as Voting Trustees, would vote Smith's own stock so as to oust him as director and president and thus deprive him of his salary (R. 409, 74).

Krizanek, plaintiff's witness, *admitted* that this removal of Smith was at the "request" of Weiss (1256). Weiss so admits as follows:

> "Q. Then was it you that wanted to get Mr. Smith out? A. Yes. It's me" (R. 444).

This shoddy affair with respect to the removal of Smith had been agreed upon by Krizanek, Steadman and Weiss on April 2nd (R. 151) and had been hidden from Smith when Smith saw Steadman and Krizanek on April 3rd (R. 151). As a matter of fact, the testimony shows that Smith stayed over in Ohio on April 4th, to see a new lead which he had received from Steadman with respect to a substitute financier for the company (R. 212-3). But on April 4th, Smith was unable to see either Steadman or Krizanek. Steadman was suddenly sick and Krizanek was suddenly unavailable and Smith, still unsuspecting returned to New York, by plane on the evening of April 4th and sent a report to Steadman going over the new financing negotiations. The tenor of the letter emphasizes the shock Smith received when he got on April 5th the notices which Krizanek and Steadman and Weiss sent out on April 4th calling for Smith's ouster and immediately cancelling his lease, his Air Line card, his phone and

the New York secretary and notifying him m he was going
to be removed at a stockholder's meeting, on n April 16th, as
officer and director (R. 99). Thus unbeknown wn to Smith and,
on April 2nd, Krizanek and Steadman had ad agreed with
Weiss to throw Smith out and rescind their eir rescission of
Weiss's option (R. 162).

In all this discussion, one cardinal point s t should be kept
in mind. Although Steadman, Krizanek and d Weiss labori-
ously tried to build up a *reason* for removing ng Smith, which
reason flivered on cross-examination, such h reason, *even*
if established, would have been of *no* judicia ial consequence.
This is because no one had testified or *e* *even intimated*
that Allied had the *right* to demand that t Smith put in
$15,000.00 or that Smith was under a *dut* *uty* to put that
money in, in default of which Smith coul ld be removed
from the company. Krizanek testified suc uch money had
never been discussed at the original finance e agreement or
thereafter (R. 148). The trial Court found t that these were
"additional conditions" (R. 477) impos osed after the
"wrongful cessation of financing" (R. 48 85). Krizanek
pointed out that the money involved was onl ly a token pay-
ment being insignificant compared to Allied's 's loan (R. 148).

The viciousness of Weiss's behavior, in in cahoots with
Krizanek and Steadman is emphasized by v what happened
thereafter. First the equity court of Dela laware held the
voting trust illegal and undid the remova al of Smith as
director and officer and salaried employee ((R. 158, 159, 82
At II 919). Thereupon this trio caused a *n* *new* notice to be
sent out. This time they dared not call a st tockholder meet-
ing because Delaware had enjoined same ((85 at II 365).
So they called a directors meeting where the ey still had con-
trol and at that meeting they first put Weis ss in as a direc-
tor in lieu of his dummy and then put Garfin nkel in as direc-
tor, in lieu of his dummy. Thereupon Kriza anek, Weiss and
Garfinkel, comprising 3 of the 4 man Bo oard, "elected"
Krizanek as President. This was in spite o of the fact that

Smith had been *restored* to his presidency by the equity court of Delaware (R. 221).

Thus since April 16, 1951 Smith, despite the agreement he had with Weiss and Krizanek, and via the instrumentality of the Voting Trust, designed to protect him therefrom, and through the turning upon him of his own lawyer, has been ousted as President of his company and deprived of his salary therefrom.

Meanwhile, Weiss, via his alliance with Krizanek and Steadman, is receiving finance fees of over $15,000 a month, a lucrative haul, protected from upset, so long as Weiss can bring successive appeals and thus stave off Smith's return to the company.

It was these events that caused the trial judge to state that Weiss was entitled to Smith's stock only "so long as Smith is treated fairly" and that " Weiss past actions indicate the need for some assurance that Smith will be so treated." It was these events that caused the trial judge to state that Weiss's "gun" would have to be removed "from Krizanek's head—enabling the three-way 'partnership' to function effectively and fairly" (R. 488).

The judge therefore conditioned the requested specific performance, on Weiss carrying out "his part" (R. 491) of the agreement, under which the option was given, and directed a bond or an escrow agreement "to assure and secure the carrying out on plaintiff's part of same" (R. 491). The Circuit Court of Appeals unanimously agreed with both the Lower Court's opinion and judgment (R., pp. 504, 505).

POINT I.

Petitioner's prayer for the issuance of a writ of certiorari should be denied, since petitioner has failed to demonstrate any of the requisite grounds therefor.

The present petition meets none of the accepted criteria for the issuance of a writ of certiorari.

The principles involved in our case are well settled and the application thereof is of importance solely to the parties involved. Our suit involved simple fact issues. No conflict of circuits or decisions has been shown. The Circuit Court of Appeals, by its affirmance, found the lower Court's findings amply supported by the evidence adduced.

The basic criteria for allowing a writ of certiorari are set forth in *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251, 60 L. Ed. 629, p. 633, as follows:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Re Lau Ow Bew*, 141 U. S. 583, 587, 35 L. ed. 868, 869, 12 Sup. Ct. Rep. 43; *Re Woods*, 143 U. S. 202, 36 L. ed. 125, 12 Sup. Ct. Rep. 417; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 383, 37 L. ed. 486, 491, 13 Sup. Ct. Rep. 758; *Forsyth* v. *Hammond*, 166 U. S. 506, 514, 41 L. ed. 1095, 1098, 17 Sup. Ct. Rep. 665; *Fields* v. *United States*, 205 U. S. 292, 296, 51 L. ed. 807, 27 Sup. Ct. Rep. 543."

In *Ohio ex rel Seney* v. *Swift & Co.*, 290 U. S. 146, 67 L. ed. 176, p. 179, the court reiterates this as follows:

"Such writs are only granted under spec
cumstances, adequately specified in forme cir-
ions. *Hamilton-Brown Shoe Co.* v. *Wolf P* pin-
Co., 240 U. S. 251, 257, 258, 60 L. ed. 629, 6s. &
36 Sup. Ct. Rep. 269." 634,

In *Layne & Bowler Corp.* v. *Western Well Wor* 261
U. S. 388, 67 L. ed. 712, p. 714, this court stated:

"It is manifest from this review of the c
sions in the two circuits as to the validity clu-
Layne patent and the proper construction the
put upon the 9th, 13th, and 20th claims, tha be
were really in harmony, and not in conflic hey
that there was no ground for our allowing th and
of certiorari to add to an already burdened d rit
If it be suggested that as much effort and time ket.
have given to the consideration of the allege we
flict would have enabled us to dispose of the con-
before us on the merits, the answer is that it is ase
important that we be consistent in not grantin ery
writ of certiorari except in cases involving p the
ples the settlement of which is of importance t nci-
public as distinguished from that of the pa the
and in cases where there is a real and embarra ies,
conflict of opinion and authority between the ing
cuit court of appeals. The present case cert cir-
comes under neither head. nly

Precedents for dismissing a writ of certi ari
improvidently granted are found in *Furness,* & *Co.* v. *Yang-Tsze Ins. Asso.*, 242 U. S. 430, L.
ed. 409, 37 Sup. Ct. Rep. 141, and in *United S tes* v. *Rimer*, 220 U. S. 547, 55 L. ed. 578, 31 Sup Ct. Rep. 596.

Writ of certiorari dismissed."

The sole arguments set forth by petitioner, in support of his application for a writ, are:

(1) The District Court had no "jurisdiction in equity" to condition plaintiff's right to specific performance, on plaintiff's performance of his part of the bargain.

(2) Such a condition deprived plaintiff of the "beneficial" use of the stock he was seeking via the specific performance suit and this deprivation was "without due process of law".

Both arguments are without legal or factual merit and the "due process" argument appears here, for the first time. We shall take up these arguments, seriatim.

POINT II.

The District Court, acting within its equity jurisdiction, had the discretion to either deny plaintiff any specific performance whatsoever or to condition same, as it did, on the performance by plaintiff of his part of the bargain.

The plaintiff, of course, recognizes that the District Court had jurisdiction of the parties and of the subject matter. His argument is that, although the Court had such jurisdiction, it "lacked equity jurisdiction to impose upon the petitioner the conditions therein contained" (Pet. Brief, p. 12).

Manifestly no question of "jurisdiction" was ever involved. The sole question was whether the District Court properly exercised its discretion with respect to the facts before it. The Circuit Court has so found and no proper basis for a writ lies herein.

Specific performance, conditioned or unconditioned, is always a matter of discretion.

Beach in his "Modern Equity & Jurisprudence" (p. 640, n 5) states:

> " • • • however strong, clear and emphatic the language of the contract, *however, plain the right at law,* if a specific performance would *for any reason* cause a result harsh, inequitable or against good conscience the court should *refuse* such a decree and leave the parties to their remedies at law."

In 65 ALR 57, the law is summarized as follows:

> " • • • it is *not* the legal right of a party to a contract to have it specifically enforced. In order to secure this relief he must show that no oppression or any unconscionable advantage has been taken of the other party to the contract, since he comes into court of conscience asking for a remedy *beyond* the letter of his strict legal right • • • the court is not bound to execute every contract; *if there is any sign of surprise which makes it unfair or not honest to call for its specific performance, the extraordinary relief will be denied* • • •."

In 49 Am. Jur. Section 58, the law is set forth as follows:

> "Equity in decreeing specific performance requires not only that the contract be just and equitable in its provisions but that the *consequences* of specific performance likewise be equitable and just. • • • Specific performance will not be decreed where it would • • • *defeat the object* for which the contract was made *or would operate unjustly* • • •."

In *Jamison Coal & Coke* v. *Goltra,* 143 Fed. 2d 889, the court (CCA) states:

"The mere fact that a contract has been breached does not determine the character of the relief which may be granted.

The equitable remedy of specific performance is *not* a matter of right. It rests in the sound judicial *discretion* of the court to grant or to reject an application invoking this power according to the circumstances of each case. *Pope Mfg. Co.* v. *Gormully,* 144 U. S. 224, 237, 12 S. Ct. 632, 36 L. Ed. 414; *Nickerson* v. *Nickerson,* 127 U. S. 668, 675, 8 S. Ct. 1355, 32 L. Ed. 314; *Barr* v. *Carnahan,* 8 Cir., 34 F. 2d 759, 760."

In *Federal Oil Co.* v. *Western Oil Co.,* 121 Fed. 674, C.C.A. Seventh, the court states at page 676:

"The contract must possess certain elements, to demand of equity the exercise of its jurisdiction to enforce performance. * * * It must be perfectly fair, equal, and just in its terms and in its circumstances, and *the situation must be such that the remedy of specific performance will not be harsh or oppressive.*"

See in accord:

The Pope Mfg. Co. v. *Philip Gormully,* 144 U. S. 224, p. 236, 36 L. Ed. 414, p. 419;
Shubert v. *Woodward,* 167 Fed. 47, C. C. A. 8th at p. 54;
McIntosh v. *Leisk,* 95 Fed. II, 164 C. C. A. 5th at p. 167 and cases therein cited.

In *Willard* v. *Tayloe,* 8 Wall 564, 19 L. Ed. 503, the court states:

> " • • • the same discretion is exercised where the contract is fair in its terms, if its enforcement from *subsequent events* or even for *collateral circumstance,* would work hardship or injury to either of the parties."

In *Gotthelf* v. *Stronahan,* 138 N. Y. 345 at page 351 the court, relying on *Willard* v. *Tayloe* supra, reiterates the principle that there will be no specific enforcement if events *subsequent* to the making of the contract "would violate the *spirit* of the contract" and render enforcement unjust.

Pomeroy, in his work on Specific Performance (3rd Ed. Sec. 185) states:

> "Not only must the agreement be fair and reasonable in its terms and its surrounding circumstances • • • the performance must not be a great hardship to the parties • • • the oppressive nature of the performance may result from the situation or relations of the parties *exterior* to and *unconnected* with the terms of the contract itself or the circumstances of its conclusion. The oppression and hardship • • • may result from • • • external facts, events or circumstances which control or affect the situation and relations of the defendant with respect to the performance. It is clear that *subsequent* events may occur, or *circumstances may becomes changed,* which shall render the performance so onerous and oppressive that courts of equity will not decree their execution" (p. 479).

Just as the Court of Equity may, in its discretion, on the proper state of facts deny any specific performance

whatsoever, so, may such Court, on the proper state of facts, condition the specific performance which it grants, upon plaintiff performing his part of the bargain (Point III, infra).

Under this point we shall focus on that law which demonstrates that the lower Court could, on the facts before it, have refused plaintiff any specific performance whatsoever. Under the following point we shall focus on the propriety of the particular conditions imposed.

There is an obligation of fair dealing, akin to that of partners, that one stockholder owes to another in such a close corporation, and this obligation permeates and flavors the many cases where the Court of Equity have refused any entry whatsoever into a close corporation, via specific performance of stock therein, to one who had indicated hostility to his contemplated partner-stockholder. "Hostility" would be only a slight description of what Weiss thinks of, and has already done to, Smith.

Wherever the problem has arisen, the Courts of Equity have *denied specific performance,* to a plaintiff of stock in a *close corporation,* where such enforcement threatened to deprive the defendant of his salary and/or his office and/or his directorship. The Court of Equity will do this even, if, unlike our case, there is no express stockholder's agreement. Where there is no express stockholder's agreement, such a deprivation is looked upon as a *fraud on the relationship* between the parties.

Rutland Marble Co. v. *Ripley,* 10 Wall 339, 19 L. Ed. 955;
McLaughlin v. *Leonhardt,* 77 A 647 (Md.);
Ryan v. *McLane,* 46 A 340 (Md.);
Riggs v. *Reading,* 43 A 212 (Penn.);

In *Hyer* v. *Richmond,* 168 U. S. 471, 42 L. ed. 547, the U. S. Supreme Court stated, in a case akin to specific Performance of Stock in a close corporation stated:

> "* * * *courts are not often wont to compel parties to unite interest and work together.* And here it may be well to notice that the contract was not one in terms for a partnership in the management of the railway, but only one for a division of the profits. The parties * * * left the queston of control and management unsettled. * * * It may, however, be conceded that there is an implication of *joint ownership* as well as of *joint interest in the management,* and in the profits arising therefrom, and thus it may be said that the contract was *really* one for a partnership. It is seldom that a court of equity will decree that a partnership which has been agreed upon shall be carried into effect. More frequently is it called upon to release parties from partnership agreements on the ground that their *antagonism* prevents the fulfillment of the purposes of the partnership, and it would seem like a contradiction to force *antagonistic parties* to form a partnership when it is one of the recognized rules of equity that such antagonism is ground for dissolving a partnership already existing."

See further in accord:

Weeks v. *Pratt,* 43 Fed. II 53 (5th Cir. cert. den. 75 L. ed. 786);
Enfeld v. *Diamond,* 51 N. Y. S. II 113;
McQuade v. *Stoneham,* 258 N. Y. S. 431 aff'd 262 N. Y. S. 966 rev'd other ground;
Denson v. *Mapes,* 71 Fed. Supp. 503 aff'd 166 Fed. 2nd 322.

There are many other analogous cases where, just as a court of equity has not permitted an applicant to *enter into* a stockholder-partner relation where he has already displayed his hostility to the maintenance of that partnership relation, so too a court of equity will not permit a stockholder-partner—already in—to, in any way, forget his relationship or breach his agreement with his fellow stockholders. Were Weiss already a stockholder, he would have been stopped from perpetrating his vicious acts against his fellow stockholder, Smith.

Thus the cases are manifold that an *existing stockholder-partner* in a close corporation, will be held to the same high fiduciary duties as any normal partner. The courts are not blinded by labels or diverted by the use of the corporation, by the *stockholder-partners,* as a vehicle for carrying out this joint venture.

Thus where one or two stockholders *ousted* their fellow stockholder from office in violation of a contract—written or oral—to maintain him therein, the court of equity has either restrained this or *reinstated* such stockholder and given any and all other relief possible.

See in accord:

Clark v. *Dodge,* 269 N. Y. 410;
Kronenberg v. *Sullivan County Laundry,* 91 N. Y. S. II 144;
Re American Fibre Chair Corp., 272 N. Y. S. 206.

In *Eisenberg* v. *Rodless,* 106 N. Y. S. II 822, Breitel, *J.,* one of three stockholders sued for *reinstatement* as officer, director and employee, pursuant to a stockholders' agreement.

The facts are interestingly close to ours. Plaintiff and Clement, one of the stockholders, were at one time sole

50/50 partners. They incorporated and gave a one-third interest to the financier together with a lucrative commission agreement. They all agreed to vote themselves as directors and officers and to employ one another as corporate employees at equal salaries.

Thereafter Clement joined up with the financier, one Druck, and his "allegiance was to Druck" so that when plaintiff tried to undo the harsh financing agreement and thus came into conflict with Druck, he was immediately removed as officer, director and employee.

The court pointed out that this was no cause for removal and then stated:

> "His directorship, officership and employment under the stockholders' agreement was a *very substantial property interest.* In a *closed* corporation like Rodless, it was what plaintiff received for giving up so much to Druck, and probably the only way in which he could derive a return from his interest in the corporation. To deprive him of it unless there is clear and convincing proof that he was faithless to Rodless, and was so, without conniving provocation by Druck, would be to give Druck advantages, without warrant, over and above what he obtained for himself by the remarkable agreements of May, 1949.
>
> The court is not satisfied that plaintiff was removed *for cause.* It believes that the causes given were *pretexts* to cover the punishment of plaintiff for questioning the agreements of May 1949, and to 'freeze' him out of Rodless, believing that he had no resources and was unlikely to earn an equivalent livelihood elsewhere. The history of the relationship of the parties and the tortuous testimony given upon the trial are revelatory and probative of the manoeuvers used by Druck and *his belatedly willing*

ally, Clements, to rid themselves of another associate." . .

In our case no pretense was ever made that Smith was removed for cause. Furthermore, in our case, Smith became persona non grata to Weiss because he was more vigilant than Krizanek in watch-dogging the performance of the finance agreements by Weiss (742, 743).

See in accord:

Silverman v. *Aderin* (N. Y. Sup. Ct. West Co., Young, J.) N. Y. Law Journal 7/27/49 p. 158;
Wernick v. *Gutken,* 72 N. Y. S. II 871;
Binon v. *Forsyth,* 64 N. Y. S. II 367 aff'd 59 N. Y. S. II 902;
Martocci v. Martocci, 42 N. Y. S. II 223 aff'd 206 A. D. 840, 43 N. Y. S. II 516;
Miller v. *Vanderlip,* 285 N. Y. 116;
Brightman v. *Bates,* 175 Mass. 105, 55 N. E. 809 (Holmes, Ch. J.).

Thus, most Courts of Equity, in the exercise of their discretion, would have given Weiss no specific performance whatsoever. Weiss had thus no complaint whatsoever when our Equity Court, exercising its discretion, gave him specific performance on condition that he carry out his part of the bargain.

POINT III.

The least protection to which defendant was entitled were the conditions decreed by the trial Court and affirmed by the Circuit Court.

The general rule is that Equity has the "power to mold each decree to the necessities of the parties' case." *Hecht Company* v. *Bowles,* 321 U. S. 321, 88 L. Ed. 755, p. 761.

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See in accord: *Elm Corp.* v. *E. M. Rosenthal Jewelry Co.*, 161 F. 2d 902, p. 909 (C. A. Dist. Col.). *Overfield* v. *Penroad Corp.*, 42 Fed. S. 586, p. 617; Pomeroy Eq. Jurisd. (4th Ed.) Sec. 60; *Bowen* v. *Hockley*, 71 F. 2d 781, p. 786 (4th Cir.).

It will be noted that plaintiff concedes the aforementioned power of the lower Court (Pltff.'s Brief, p. 19).

In molding its decree the Court of Equity "may vary, qualify, restrain and modify the remedy it applies so as to do equity and to avoid inequity to mutual and adverse claims, and the substantial right of all parties" (*Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, p. 781—8th Cir.). Thus the Court of Equity "in awarding relief to one party may impose conditions protecting and giving effect to correlative rights of the other (cases cited)". *Kinney Coastal Oil Co.* v. *Kuffer*, 277 U. S. 487, 72 L. Ed. 961, p. 967. See in accord: *Central Ky. Nat. G. Co.* v. *Railroad Company*, 290 U. S. 264, 78 L. Ed. 307, p. 313; *Buchalter* v. *Rude*, 54 F. 2d 834, p. 839—10th Cir.; *Elm* v. *Rosenthal*, 161 F. II 902, p. 909; Pomeroy, Eq. Jurisp., 4th Ed., Sec. 60).

In granting plaintiff relief on condition that plaintiff accord to his adversary the corresponding rights to which he is also entitled, the Court of Equity is not limited to rights arising from the contract in suit but may recognize any equities arising from or connected with the *subject matter of the suit.*

In *Lynch* v. *Burt*, 132 F. 47, p. 432, cited with approval in *Kinney Coastal Oil* v. *Kuffer*, 277 U. S. 487, 72 L. Ed. 967, supra, the court states:

> "That he who seeks equity must do equity is a controlling principle or maxim of universal application in awarding equitable remedies. Following it, adverse equities growing out of or closely connected with the *subject matter of the suit* are protected by

> giving to a party the relief to which he is entitled only on condition that he accords to his adversary the corresponding right to which he also is entitled."

See in accord: *Burnes* v. *Burnes,* 137 F. 781, p. 801; *Overfield* v. *Pennroad Corp.,* 42 Fed. S. 586, 616; Restatement Law of Contracts, Sec. 359).

In *Willard* v. *Tayloe,* 19 L. Ed. 503, 8 Wall 564, the Supreme Court stated it would leave the parties to their legal remedy "unless the granting of the specific relief can be accompanied with conditions which will obviate that (unjust) result." The court stated that there would be no specific performance where inequity resulted from change of circumstances "unless the plaintiff will *consent* to a conscientious modification of the contract or • • • take a decree upon condition of doing or relinquishing certain things to the other party."

In *Cronen* v. *Moore,* 210 Fed. 239—9th Cir., the court specifically conditioned plaintiff's relief on performance by plaintiff of a *collateral* agreement arising from the *subject matter* of the contract. The court stated:

> "The court may not only require compliance with all the terms of the contract as a condition precedent to specific performance, but it is within the court's discretion to withhold specific performance and leave the complainant to his remedy at law, unless he consents to submit to such terms and conditions in relation to the *subject-matter* of the contract as the court may deem just and equitable, notwithstanding that those terms and conditions may not have been expressed in the contract. • • • *Willard* v. *Tayloe,* 8 Wall. 557, 19 L. Ed. 501; *Westinghouse Air-Brake Co.* v. *Chicago Brake & Mfg. Co.* (C. C.) 85 Fed. 786; *Kirkland* v. *Downing,* 106 Ga. 530, 32 S. E. 632; *Richards* v. *White,* 44 Mich. 622,

7 N. W. 233; *Secrest* v. *McKenna*, 1 Strob. E2 (S. C.) 356. * * * Pomeroy Contracts, Sec. 175."

Some illustrations of the manner in which the Court of Equity has molded its decree to compel plaintiff to do justice to the defendant, if plaintiff wishes specific performance will be noted below.

In *Cronen* v. *Moore*, 210 Fed. 239—9th, supra, the plaintiff was given specific performance only on condition that he perform an undertaking, connected with the contract in suit, but nowhere mentioned therein and concededly no condition thereto.

In *City of La Follette* v. *La Follette Water, Light & Telephone Co.*, 252 Fed. 762 (6th Cir.) the court gave specific performance only on condition that plaintiff consented to certain *modifications* of the contract. The City was compelled to specifically perform a lighting contract, but only on condition that certain poles be placed in locations different than those contracted for, such locations being now more efficacious by virtue of events subsequent to the contract. The Court stated:

> "If, therefore the plaintiff consents to the equitable conditions hereinabove indicated, a decree will be entered providing that upon these conditions is it is entitled to enforce the contract rights vested in it against the City * * * "

In *The Mechanics Bank of Alexandria* v. *Lynn*, 7 L. Ed. 185, specific performance was decreed only on condition that plaintiff guaranteed that defendant's collateral rights be protected.

> "The complainant may be considered as asking the specific execution of an agreement, by which the bank stipulated to accept in satisfaction of this judg-

ment, the provisions made by Lynn for his creditors in the deed of trust. But the court ought not to decree performance, according to the *letter*, when from *change of circumstances*, mistake or misapprehension, it would be unconscientious so to do. The court may so *modify the agreement* as to do justice as far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modification as justice requires."

In *Lynch* v. *Burt*, 132 Fed. 417, p. 433, the court conditioned plaintiff's specific performance so as to make sure that he treated defendant justly, by requiring that, if plaintiff didn't so do, that then plaintiff had to relinquish the land received by him via the specific performance. The Court stated:

> "The transaction between Burt and Phipps gave him no interest in one section of the land, but that section was included in the Gotzian sale and in the Dwinnell sales. The decree provides that, if the complainant fails to reimburse Phipps for redeeming from the Gotzian sale, and if Phipps pays to the complainant the full amount of the principal Dwinnell judgment, with interest, costs and taxes, the complainant shall *relinquish* to Phipps *all* the lands, including this section. *We perceive no error in this.* In the event contemplated, Phipps would be *justly entitled* to *all* and the complaint to *none*, of the rights and benefits which passed by the Gotzian and Dwinnell sales."

See in accord: *Levy* v. *Kriss*, 285 F. 836 cert. denied 69 L. Ed. 462, 58 C. J., Sec. 616, p. 1265 and cases cited; 30 C. J. S., Sec. 602, p. 993, and cases cited; 21 C. J., Sec. 849, p. 667 and cases cited; and actual decree in *Meinhard* v. *Salmon*, 249 N. Y. 458, Cardozo, J.

The plaintiff although recognizing the Lower Court's *right* to impose conditions (Pltff.'s Brief, p. 19), argues against the particular conditions imposed but never offered substitute ones.

Plaintiff states that the Lower Courts conditions purport "to govern persons not parties to this suit" (Pltff.'s Brief, p. 13). The trial court never purported to affect anyone except the *two* parties to the action. Its decree was carefully limited at all times and at all places to the *two* parties before it. The condition was simply that plaintiff carry out the agreement "on *plaintiff's* part" (1471); to "vote *his* stock" and to "use *his* best efforts" (1473). Nobody else was asked to do anything. Nobody else was even alluded to (1470-1476). The non-compliance of others would not and could not be non-compliance by him.

Plaintiff argues (p. 14) that the court's decree will interfere with the internal management of foreign corporations and that our courts will not readily interfere therein, citing cases to the latter effect (Pltff.'s Brief, pp. 23-25).

We need not explore such law or determine whether this is a situation where the court should interfere with internal management. Our decree does not interfere with the internal management within the meaning of the law quoted. In the first place, it does *not* call for any of the things complained of by plaintiff. It does not require, as plaintiff states, "a stockholders meeting" (p. 14) or "directors meeting" (p. 11). It simply states that *at* stockholders meetings the plaintiff so vote his stock as to live up to his agreement as to election of directors (1472) and "use his best efforts" to have the Board of Directors pay the agreed salary (1472). Nothing is said as to dividends.

But in any event, the enforcement of an agreement by stockholders to elect themselves directors and as directors to elect themselves as officers at specified salaries, in *closed*

corporations, is not within the rule against interference with the internal management of foreign corporations.

In *McQuade* v. *Stoneham,* 230 A. D. 57, 242 N. Y. S. 548 (1st Dept.) the plaintiff sued to specifically enforce a stockholders agreement, similar to ours, involving stock in a *foreign* corporation. The court overruled the contention that enforcement would involve the regulation of the internal affairs of such corporation.

> "It must be borne in mind that this contract is *between individuals* * * *. This contract in *nowise* directly affects the internal affairs of a corporation * * *. By this action the plaintiff is seeking to enforce *his* rights against an *individual* and does *not* attempt to regulate the affairs of a corporation organized in another state."

In this respect it will be noted that in the cases cited by the plaintiff, the *corporation* was a party and the decree requested was against the *corporation.*

See in accord:

McQuade v. *Stoneham,* 256 N. Y. S. 431, p. 434, reversed on other grounds 263 N. Y. 323;
Butler v. *Standard Milk,* 146 A. D. 735, 131 N. Y. S. 451 (1st Dept.), (foreign corp.);
Matter of Allen Jr. etc. (*Wickwire Spencer Steel Co.*) N. Y. Sup. Co., N. Y. Co., McGeehan, J., N. Y. L. J., 4/23/42, p. 1716 (foreign corp.).

Plaintiff argues (p. 15) that the stockholders' agreement was illegal in that the decree calling on Weiss to live up to his stockholders agreement, if he wants specific performance, violates the Delaware law requiring the business to be run by the directors (p. 30). The section of the Delaware law alluded to is common to that of most

states, including New York. The law is definitely settled that the enforcement of an agreement between the stockholders of a *close* corporation to elect themselves as directors and as directors to elect themselves as officers at a designated salary does not violate that law.

Meck Stockholders Agreement, 47 Y. L. J. 1079, 1087;
Delaney Stockholders Agreement, 50 C. L. R. 51;
Hornstein Stockholders Agreements, N. Y. L. J., 4/11/50;
Clark v. *Dodge,* 269 N. Y. 410;
Binon v. *Forsythe,* 64 N. Y. S. 2d 367, aff'd 270 A. D. 77, 59 N. Y. S. 2d 902 (2nd Dept.);
Slonin v. *Broadway,* 109 N. Y. S. 2d 440;
Martocci v. *Martocci,* 42 N. Y. S. 2d 222, aff'd 206 A. D. 840, 43 N. Y. S. 2d 516 (1st Dept.) and cases cited;
Ringling Bros. v. *Ringling,* 29 Del. Ch. 610, 53 A. II, 441.
See all the cases enforcing such agreements cited under supra, pp. 19-22.

Plaintiff objects (p. 18) to the well settled right of the Lower Court to retain jurisdiction to insure the working out of its decree. (*City of La Follette* v. *La Follette Water,* 252 Fed. 762, p. 776, C. C. A. 6th). Incidentally plaintiff did not object to this in the course of its appeal to the Circuit Court.

Plaintiff argues (p. 19) that Smith's remedy at law was adequate to enforce any salary or profit rights. Here plaintiff again overlooks several things. Smith was enforcing nothing. Weiss was seeking specific performance and the Lower Court could condition such enforcement on Weiss living up to Smith's legal or equitable rights or both. Secondly, Smith's right to his directorship and

officership were important property rights which would have been specifically performable by Smith, as set forth in the many cases supra.

POINT IV.

Petitioner has not been deprived of any rights. No question of "due process" is involved.

Petitioner claims that if he is compelled to carry out his part of the bargain as a condition to making the defendant perform, he, the plaintiff, is being deprived of the beneficial rights of ownership "without due process of law".

Since petitioner recognizes the Court's right to "impose conditions so as to best effectuate the purposes for which the contract was made" (Pet. Brief, p. 12) it is difficult to see how the application of that legal rule to the specific facts, found by the District Court and upheld by the Circuit Court could have taken anything from plaintiff to which he was entitled and could have done so without due process.

Petitioner doesn't like the result. Petitioner doesn't like to be compelled to live up to his end of the bargain. He would like the stock free from the restritcions of his own making. The imposition of those restrictions is truly just and equitable. The non-imposition thereof would have been unjust and inequitable. But in neither situation could such imposition of conditions or non-imposition be held a violation of "due process".

In *Tracy* v. *Ginzberg*, 205 U. S. 170, 51 L. Ed. 755, the petitioner claimed that the judgment of the Massachusetts Court had deprived him of his property without due process. The United States Supreme Court held:

"The plaintiff also insists that by the judgment of the supreme judicial court of Massachusetts he has been deprived of his property without the due process of law guaranteed by the 14th Amendment of the Constitution of the United States. This proposition is without merit. Within the meaning of that Amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. The court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy,—upon which question we express no opinion,—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court involving merely the ownership of property could be brought here for review,—a result not to be thought of. The 14th Amendment did not impair the authority of the states, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before them, controverted questions as to the ownership of property, which did not involve any right secured by the Federal Constitu-

tion, or by any valid act of Congress, or by any treaty. Within the meaning of that Amendment, a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.' Den ex dem. *Murray* v. *Hoboken Land & Improv. Co.*, 18 How. 272, 15 L. ed. 372; *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244 4 L. ed. 559, 561. It cannot be said that the state court in this case, by its final judgment, departed from those usages or modes of proceeding.

The judgment is affirmed."

In *State of Kansas ex rel Beck* v. *Occidental Life Insurance Co.*, 95 Fed. 2d 935 (10th Cir.) Cert. den. 59 S. Ct. 63, 305 U. S. 603, 83 L. ed. 383, the court states:

"The remaining contention advanced is that the contract of reinsurance and the decree approving it do not authorize the withdrawal of the deposited securities, and that the order requiring their withdrawal and delivery violates the due process clause in the Fifth Amendment to the Constitution of the United States. The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense. An order, judgment, or decree entered in such circumstances does

not violate the due process clause even though it be erroneous in fact or law, or both. *Hagar* v. *Reclamation District No. 108,* 111 U. S. 701, 4 St. Ct. 663, 28 L. ed. 569; *Holden* v. *Hardy,* 169 U. S. 366, 18 S. Ct. 383, 42 L. ed. 780; *Endicott Johnson Corp.* v. *Encyclopedia Press,* 266 U. S. 285, 45 S. Ct. 61, 69 L. ed. 288; *Dohany* v. *Rogers,* 281 U. S. 362, 50 S. Ct. 299, 74 L. ed. 904, 68 A. L. R. 434; *Powell* v. *Alabama,* 287 U. S. 45, 53 S. Ct. 55, 77 L. ed. 158, 84 A. L. R. 527; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 53 S. Ct. 620, 77 L. ed. 1265; *Owens* v. *Battenfield,* 8 Cir., 22 F. 2d 753. The proceeding involved here was in due form; the court had jurisdiction of the subject matter; and the state and the commissioner had notice and were heard. That satisfied in full measure the exactions of due process. Affirmed."

In the case of *Owens* v. *Battenfield,* 33 Fed. 2d 753, cited above, certiorari was denied in 50 S. Ct. 88, 280 U. S. 605, 74 L. ed. 649. See in accord: *Bonner* v. *Gorman,* 213 U. S. 86, 53 L. ed. 709; *Corrigan* v. *Buckley,* 271 U. S. 323, 70 L. ed. 969; 16 C. J. S. Sec. 625, p. 1273.

It is respectfully submitted that petitioner's application for a writ of certiorari should be denied.

Dated, New York, New York, August 15, 1952.

Respectfully submitted,

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